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No. 82-523

IN THE SUPREME COURT OF THE

UNITED STATES

October Term, 1982

SANGER BOATS, INC., and
TRAVELERS INSURANCE COMPANY,

Petitioners,

vs.

LAWRENCE SCHWABENLAND,

Respondent.

OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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STATES COURT OF APPEALS FOR
THE NINTH CIRCUIT

STATEMENT OF THE CASE

Respondent substantially agrees with the statement of the case contained in the Petition filed in this action.

Respondent also concurs in the contents of

the appendices included in the Petition, and will cite to them in his argument.

SUMMARY OF ARGUMENT

Contrary to petitioners' contention, the Court of Appeals below found that respondent's employment activities fit properly into the traditional category of "shipbuilder." Respondent clearly satisfies the "status" requirement under the Longshoremen's and Harbor Workers' Compensation Act (LHWCA). Therefore, there is no need for this Court to explore the scope of either the status requirement or the term "maritime employment" in this case.

The Court of Appeals properly found that the LHWCA applies to the recreational boating industry. The resulting decision comports with a prior ruling of this Court, and is in harmony with the only other circuit to have decided the issue. In opposition to this position, petitioners offer only an ambiguous Congressional Record excerpt and an inapposite citation to the LHWCA.

Finally, the Court of Appeals properly refused to decide whether respondent was exempt from LHWCA coverage in that he may have been "the master or member of of a crew" of a vessel. This issue was not timely raised during prior administrative proceedings, and should not be raised for the first time on appeal.

ARGUMENT

I

THE FINDINGS BELOW AS TO RESPONDENT'S EMPLOYMENT STATUS DO NOT CONFLICT WITH PRIOR DECISIONS OF THE SUPREME COURT

Petitioners claim, at Page 12 of their Petition, that the holding herein by the Ninth Circuit Court of Appeals "virtually eliminates the status requirement" of the Longshoremen's and Harbor Workers' Compensation Act (LHWCA), 33 U.S.C. §§ 901 to 950, and therefore conflicts with the decisions in P.C. Pfeiffer Company, Inc. v. Ford, 444 U.S. 69 (1979) and Northeast Marine Terminal Co. v. Caputo, 432 U.S. 249

(1977). Such claims are inaccurate, and do not merit the granting of a Writ of Certiorari.

The Court of Appeals, far from eliminating the status requirement, made a specific finding that respondent Lawrence Schwabenland's job duties constituted maritime employment:

> It is undisputed that Schwabenland conducted visual inspections of boats under construction to make certain that they were in compliance with the orders received. The inspection duties, the testing of new models to evaluate their design, and the performance of occasional maintenance in connection with the testing activities would seem to be sufficiently related to the construction of the vessels to constitute maritime employment covered under the Act. Ninth Circuit Court of Appeals Opinion, Petitioners' Appendix A, Page 10.

Petitioners confuse the issue somewhat, at Page 13 of their Petition, by stating that respondent's "activities are not of the type traditionally performed by longshoremen." While this may be true, this Court has recognized that the LHWCA covers, in addition to the longshoreman, the "harbor worker, ship repairman, shipbuilder, [and] shipbreaker."

Northeast Marine Terminal Co. v. Caputo, supra, at Page 273. As found by the Court of Appeals, respondent's activities fit properly into the traditional category of "shipbuilder." Therefore, there is no need for this Court to address petitioners' questions at Pages 13 and 14 as to the scope of the term "maritime employment."

Insofar as the Court of Appeals herein utilized the status test in reaching its decision, that decision does not conflict with the decisions in either Pfeiffer or Caputo.

II

APPLICATION OF THE LHWCA TO THE RECREATIONAL BOATING INDUSTRY IS NOT NEGATED BY EITHER CONGRESSIONAL INTENT OR BY CASE LAW

Petitioners next assert that the Court of Appeals below erred in holding that the LHWCA applies to the recreational boat industry. In support of their position, they first cite, at Page 16 of their Petition, an ambiguous excerpt from the Congressional Record.

They further rely upon the "eighteen tons net exclusion" of the LHWCA. However, that exclusion is not a general exclusion of all work on or related to small vessels. Instead, it applies only to "any person engaged by the master to load or unload or repair any small vessel under eighteen tons net." 33 U.S.C. § 903(a)(1) (emphasis added). The exclusion is only for the specified circumstances of hiring, as recognized in Continental Casualty Co. v. Lawson, 64 F.2d 802, 805 (5th Cir. 1933): it was intended only to prevent the "master" of a small vessel from exposing its owner, whose investment is relatively small, to the substantial liability imposed by the LHWCA, without the owner's consent.

It is apparent that petitioners have done nothing to undercut the implication of Parker v. Motor Boat Sales, Inc., 314 U.S. 244 (1941), that the LHWCA applies to the recreational boating industry. In addition, the Court of Appeals' decision below not only does not

conflict with any decision of this Court, but is in complete harmony with the only other circuit which has squarely faced this issue. See Mississippi Coast Marine v. Bosarge, 637 F.2d 994, 998-1000, modified in part, 657 F.2d 665 (5th Cir. 1981).

III

THE ISSUE OF RESPONDENT'S POSSIBLE STATUS AS THE "MASTER OR MEMBER OF A CREW" OF A VESSEL WAS NOT TIMELY RAISED BELOW, AND CANNOT BE RAISED ON APPEAL

Petitioners are attempting, at the appeal stage, to introduce the issue of whether respondent was "the master or member of a crew" of a vessel and therefore not covered by the LHWCA. See Ninth Circuit Court of Appeals Opinion, Petitioners' Appendix A, Page 6.

The Court of Appeals refused to consider this issue, in that it had not been timely raised in prior administrative proceedings. See Parker v. Motor Boat Sales, Inc., 314

U.S. 244, 251 (1941).

Petitioners now argue, at Pages 20 to 21 of their Petition, that their prior failure to raise the issue is moot, since there is "no reason to believe" that the issue would have been addressed by the initial trier of fact. Such an argument is untenable, and supposes foreknowledge by petitioners of the decisions of the lower tribunals. Not surprisingly, petitioners cite no authority in support of their position.

CONCLUSION

Based on the foregoing, respondent Lawrence Schwabenland respectfully submits that the Writ of Certiorari sought by petitioners should be denied.

Respectfully submitted,

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October 21, 1982